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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Number 76-1750

Ora E. McFarlin, Warren G. Sunday, Harold D. Stump, John H. Hines, M.D., John C. Harvey, M.D., Harry M. Covell, M.D. and DeKalb Memorial Hospital, Inc.,
Petitioners.

-vs-

Linda Kay Sparkman and Leo Sparkman,
Respondents.

BRIEF OF THE STATE OF INDIANA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, by Darrel K. Diamond Assistant Attorney General, pursuant to Rule 42 of this Court, submits its *amicus curiae* brief in support of the Petitioners in this cause.

Consent of the Parties

This brief is filed by the State of Indiana pursuant to Rule 42 of this Court. Consent of the parties is not required pursuant to Rule 42(4).

Interest of the Amicus

The interest of the State of Indiana in the determination of the question presented in this case is twofold. First, the State of Indiana has an interest in the ability of judges of courts of the State of Indiana to determine matters presented to them free from the harassment of vexatious litigation. Second, and more important is the interest of the State of Indiana in maintaining its right to define and establish the jurisdiction of its own courts. The action of the United States Court of Appeals in this action would appear to make the determination of the jurisdiction of state courts a matter of federal law, at least insofar as the determination of that jurisdiction is involved with the invocation of judicial immunity by state court judges in actions against them in federal courts.

ARGUMENT

A.

The Doctrine of Judicial Immunity.

The doctrine of judicial immunity may be considered one of the most firmly settled doctrines of Anglo-American common law. This Court definitively stated and adopted the doctrine in *Bradley v. Fisher,* 80 U.S. (13 Wall) 335 (1872). The applicability of the doctrine to cases under the federal civil rights statutes, specifically 42 U.S.C. § 1983, was noted and the doctrine was reaffirmed in *Pierson v. Ray,* 386 U.S. 547 (1967). It was noted in *Bradley v. Fisher* that the absence of such immunity

> ". . . would destroy that independence without which no judiciary can be either respectable or useful." 80 U.S. at 347.

It was also noted that the doctrine has been recognized throughout the history of the common law. The leading Indiana case on the subject, *State ex rel. Egan v. Wolever,* 127 Ind. 306 (1891), traces the rule to the Year Books of the early kings of England. 43 Edw. III, 9; 9 Edw. IV, 3; cited at 127 Ind. at 311.

The opinion of the United States Court of Appeals for the Seventh Circuit in this case purports to uphold the doctrine while finding this case to be outside its scope. That determination of scope, however, is clearly erroneous and would act to totally destroy the immunity.

The scope of the immunity was held by this Court in *Bradley v. Fisher* and *Pierson v. Ray* to extend to the point of the full subject matter jurisdiction of the defend-

ant judge. Only a clear absence of all jurisdiction over the subject matter of the action would result in the denial of the immunity. 80 U.S. at 351-353; 386 U.S. at 554. While the Court of Appeals purported to find a total lack of subject matter jurisdiction, the opinion of that Court shows merely that the action of the defendant Judge Stump was considered erroneous and that the result was one that the judges of the Court of Appeals strongly disagreed with on policy grounds. It is suggested that the basis of the Court of Appeals opinion is its statement that:

> "There are actions of purported judicial character that a judge, even when exercising general jurisdiction, is not empowered to take." Pet. for Writ, p. A14.

The equation of the Court of Appeals that error is the same as a clear lack of subject matter jurisdiction is ample reason for reversal of that decision and reinstatement of the order of dismissal of the District Court. The existence of such an opinion, however, would appear to be reason for this Court to examine more closely the standard of clear absence of general subject matter jurisdiction.

B.

The Indiana Court System.

In this case, the judge of a state court was sued in federal court for actions which were asserted by the defendant judge to have been within the scope of his judicial power. Since the standard for determination of the privilege is that of subject matter jurisdiction, the federal court must determine the question of the scope of jurisdiction of the State Court. The State of Indiana would assert most strongly that such determination must be made as a question of state and not federal law. Basic principles

of federalism and comity would require such a result. Such result is also demanded by recognition that the states retain some measure of sovereignty within our federal system. This Court has recognized that certain powers are reserved to the states under the Tenth Amendment which may not be interfered with by the federal government. *National League of Cities v. Usery*, — U.S. —, 96 S.Ct. 2465 (1976.) The determination of the jurisdiction of the courts within the state judicial system must surely be one of those reserved rights. A brief sketch of the Indiana judicial system is therefore set out for the convenience of this Court.

The basic trial court unit of the Indiana judicial system is the Circuit Court. This case involves a Circuit Court. The State of Indiana is divided into eighty-eight (88) judicial circuits. Eighty-four (84) of these consist of one county; the remaining four (4) consist of two counties each. Indiana Code, 33-4-1-1, *et seq.* As the population and caseload of a county increases to the point that the single Circuit Court is insufficient, additional courts are created by individual statute. These may include Superior Courts, Probate Courts, Criminal Courts, and Juvenile Courts as separate entities. The scope of jurisdiction of these courts is set out in those creating statutes. Ordinarily these additional courts share judicial power concurrently with the Circuit Court. In some cases, however, these courts are given exclusive jurisdiction so as to decrease the jurisdiction of the Circuit Court. In the most populous county, Marion County (Indianapolis), for example, the jurisdiction of the Circuit Court is limited by grants of exclusive jurisdiction to a Probate Court, Criminal Court and Juvenile Court. Indiana Code, 33-8-1-9, 33-9-1-4, 33-12-2-3. There are no such additional courts, however, in DeKalb County, from which this action arose.

It should be noted that each county has a Juvenile Court, but in counties with less than 250,000 population, the Circuit Court and judge fulfill the function of the Juvenile Court and judge. Indiana Code, 33-12-2-1, 33-12-2-2. It was held in the case of *Harris v. Souder,* 233 Ind. 287 at 291 (1954), that the Circuit Court judge when exercising juvenile jurisdiction was not acting as judge of a separate court. That case was later overruled to the extent that it would allow the court to deny an offender found to be a juvenile the right to have his case transferred to the Juvenile Court for a full and formal determination of whether the case should be waived back for trial of the defendant as an adult. *Hicks v. State,* 249 Ind. 24 at 29 (1967). That holding in *Hicks,* however, would not appear to be a total overruling of the proposition that the Circuit Court and Juvenile Court, in counties of less than 250,000 population, are not separate entities, but that the latter is a jurisdiction within the former.

For purposes of this brief, it is not necessary to consider the appellate system or the system of courts of limited misdemeanor and small claims jurisdiction Insofar as relevant to this case, the Circuit Court of DeKalb County was the sole general jurisdiction court. As such its jurisdiction is that set forth in Indiana Code 33-4-4-3 (set out in full in the Petition for Writ of Certiorari at p. 5), which is "original exclusive jurisdiction in all cases at law and in equity whatsoever."

C.

Subject Matter Jurisdiction

It must then be considered what the term "subject matter jurisdiction" means. For purposes of judicial immunity,

determinations of a defendant judge as to the presence or lack of jurisdiction should be viewed liberally in favor of a finding that jurisdiction exists. Any lack of jurisdiction, to defeat the immunity, must be clear and obvious.

> "Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised." *Bradley v. Fisher, supra* 80 U.S. at 352.

The example used in *Bradley* was that if a probate court judge, whose jurisdiction is limited to wills and decedents' estates, should attempt to judicially punish persons for violation of criminal laws, then there would be no immunity. But the judge of a court having criminal jurisdiction would be immune if he were to try a defendant for an act which was not a crime or impose a penalty greater than allowed by law. *Ibid.*

That question of the meaning of subject matter jurisdiction was considered in the context of judicial immunity and as a matter of Indiana law in the leading case of *State ex rel. Egan v. Wolever, supra.* It was there stated:

> "Where a court of limited jurisdiction has, in a given case, jurisdiction of the subject-matter, and of the persons interested, the same immunity is accorded to the judge, or magistrate, that is in any case accorded to the judge of a court of general jurisdiction. And here we would remark, that by jurisdiction of the subject-matter is not meant simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs . . . In the latter case it is said that by subject-matter is meant the abstract thing and not the particular case.

> It is said that in courts of general jurisdiction, an action never lies against the judge because he has jurisdiction of all causes." 127 Ind. at 315.

Thus, the nature of the case is not a grounds for holding that a court of general jurisdiction lacks subject matter jurisdiction so as to subject a judge to liability. It was noted, however, that it was possible for a court of general jurisdiction to lack jurisdiction in certain circumstances. The examples given are that of a judge purporting to act after the case was concluded or after a change of venue was taken.

These examples given are of questionable authority today in light of later decisions of Indiana courts, however. In *Smith v. Indiana State Board of Health,* — Ind. App. —, 303 N.E. 2d 50 at 53, the Indiana court noted that even though a proper motion for change of venue deprives the court in which it is filed of further jurisdiction, yet some vestige of jurisdiction is retained to decide any necessary interlocutory matters. In *J.I. Case Co. v. Sandefur,* 245 Ind. 213 at 217, it was alleged that the trial court had lost jurisdiction upon the death of the original plaintiff since the action was not covered by the statute on survival of actions. It was there held:

> "So long as a court has general jurisdiction of the subject matter to which a case belongs, a defendant may waive his right to object to the jurisdiction by failing to make timely and specific objections thereto."

In the case of *Farley v. Farley,* 157 Ind. App. 385 at 395-399, it was argued that the allowance of attorney fees and litigation expenses 149 days after the entry of the divorce decree was void because the time for such modification of the decree had passed. The Indiana court ruled

that such matters were not questions of subject matter jurisdiction. The trial court had power to act in divorce actions as a class, therefore the bar to the specific action of the trial court was not one involving general subject matter jurisdiction and was valid because no timely objection had been made. 157 Ind. App. at 398.

It may be noted that this Court recently refused to consider an issue of subject matter jurisdiction which was not timely raised. It was noted that the issue "is not of the jurisdictional sort which the Court raises on its own motion." *Mt. Healthy City School District v. Doyle,* — U.S. —, 97 S.Ct. 568 at 572 (1977). Yet federal courts are not courts of general jurisdiction but of limited jurisdiction. It would thus appear that such jurisdictional bars are not of the force that they were at the time of the decision of the *Wolever* case.

Returning to the basic question of subject matter jurisdiction, it is noted that under Indiana law, jurisdiction is of two types, although these are sometimes confused in opinions. The general power over a class of cases is subject matter jurisdiction. Jurisdiction of the particular case deals with the right to entertain a particular case within that class of cases. *Farley v. Farley, supra.* Only the general subject matter jurisdiction is involved for considerations of judicial immunity.

It is also essential to distinguish between subject matter jurisdiction in the broad sense relevant to judicial immunity and the issue of failure to state a claim.

> "The question of jurisdiction of the subject matter is not dependent upon the validity of the demands set forth in the complaint nor upon the sufficiency of the allegations thereof." *Noblesville City Plan Commission v. Gatewood,* 134 Ind. App. 609 at 612 (1963.)

That distinction is also the law of the federal courts. As stated in *Bell v. Hood,* 327 U.S. 678 at 682 (1946):

> "For it is well settled that the failure to state a proper cause of action calls for a judgement on the merits and not for a dismissal for want of jurisdiction."

The case of *A.L. v. G.R.H.*, — Ind. App. —, 325 N.E. 2d 501 (1975), has been treated as of major significance throughout this case. In that decision, the Indiana courts ruled in a declaratory judgment action that a parent had no common law right to have his or her child permanently and involuntarily sterilized. That ruling, it is asserted by the State of Indiana, did not specifically decide any question of subject matter jurisdiction, except that it gives rise to an inference that subject matter jurisdiction exists, as noted by the District Judge. Pet. for Writ at A6. The question there was whether there was a legal right to do so, not whether a court had jurisdiction to decide the issue. Indeed, in that case the Indiana courts did decide the issue, thus necessarily assuming that there was jurisdiction to do so. Despite the opinion of the Court of Appeals in this case, it cannot be considered to be the law that a court has jurisdiction if it reaches the right decision but lacks jurisdiction if it reaches the wrong decision. That question is one of failure to state a claim rather than of jurisdiction.

The references in *A.L. v. G.R.H.* to circumstances under which such sterilization could be done is an indication that an Indiana court of general jurisdiction does has subject matter jurisdiction to consider whether there is a legal right to consider whether a parent may bring about the involuntary sterilization of the child. The erroneousness of the decision reached has never been a factor which would deny judicial immunity.

D.

Standard for Consideration of the Complaint.

This case was decided in the District Court upon a Motion to Dismiss. The general rule is that such a motion alleging failure to state a claim upon which relief may be granted admits *arguendo* all the allegations of fact contained in the Complaint. That standard appears inconsistent with the rule in judicial immunity cases that immunity cannot be defeated by mere allegations of wrongdoing and that determinations of jurisdiction by the defendant judge in the prior action giving rise to the further litigation will be viewed in a favorable light. It should be noted that in *Bradley v. Fisher, supra,* one of the major issues was whether the immunity would be defeated if it were determined that the defendant judge had acted maliciously or corruptly. It was held that such allegations in a Complaint were of no avail.

> "Few persons sufficiently irritated to institute an action against a judge for his official acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action." 80 U.S. at 348.

In this case, for example, the opinion of the Court of Appeals notes and appears to place some weight upon what is stated as the fact that the petition for involuntary sterilization and judicial approval were never filed in court. If the truth of that allegation were to be grounds for deter-

mining the availability of judicial immunity*, then the conflict would be clear. The purpose of judicial immunity is to insure independent and principled decision making by judges free from the pressure and harassment of vexatious litigation. That purpose would be thwarted to the extent that allegations of procedural error would be allowed to defeat the protection given to judges in carrying out their vital functions.

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*Such a matter should not be considered vital, but merely as one piece of circumstantial evidence as to whether the judge had been acting in a judicial capacity in acting as he did. In this case, it would be difficult to imagine any reason for the parties to act as they did if Judge Stump's actions were not a judicial determination. Making the act of filing to be central would create the possibility that a judge would be found liable because of the failure of a clerk to perform a ministerial duty.

CONCLUSION

For the foregoing reasons, the State of Indiana as *amicus curiae* urges this Court to grant the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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